No. 12127

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BURNS STEAMSHIP COMPANY, a corporation, and ASSOCIATED INDEMNITY CORPORATION, a corporation,

Appellants,

vs.

WARREN H. PILLSBURY, as Deputy Commissioner, 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency, and ANNA ANDERSON,

Appellees.

APPELLANTS' OPENING BRIEF.

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Appellees.

APPELLANTS' OPENING BRIEF.

Jurisdiction.

Jurisdiction of the United States District Court in this case is clearly established by the allegation in the complaint that it arises under 33 U. S. Code 921, 44 Stat. 1436, 49 Stat. 1921 [Tr. 2].

Statement of the Case.

On November 29, 1947, the Burns Steamship Company was the employer of one John A. Anderson. As to liability under the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1949 (33 U. S. C. A. 901-950), the employer carried insurance through the Associated Indemnity Corporation [Tr. 2, 3]. On said date, Mr. Anderson was working as a hatch tender and longshoreman on the S. S. Daisy Gray, afloat in navigable waters in Los Angeles Harbor [Tr. 7, 8]. An-

derson was giving signals to control use of the ship's winches [Tr. 8]. His immediate superior officer was the chief mate, Mr. Ernest L. Bliss [Tr. 8, 20, 22]. Just before the fatal accident occurred, Anderson asked Bliss for permission to use the sling on the dock which was then loaded with coal, by bringing the coal on board with the No. 1 gear, thereby freeing the sling so that he, Anderson, could do a favor for a Mrs. Hamilton, the wife of a man in the galley, using the sling to unload some scrap lumber for her fireplace [Tr. 8, 22-23]. The Chief Mate refused permission and explained that the coal had to be loaded on the starboard and that that work would be done by the ship's crew, with the No. 2 gear [Tr. 22-23]. (This conversation was somewhat ambiguously described in the Commissioner's findings both as a "direction" and as a "request," to let such sling load of coal remain on the dock that it might be brought on board later by members of the ship's crew who would operate winches at the next hatch [Tr. 8].)

Anderson disregarded the said direction (or "request") of his superior, and almost immediately gave a signal to bring the coal on board with the No. 1 winch [Tr. 33]. The mate had walked away from Anderson, and just as he was walking back, he saw the sling load of coal coming aboard [Tr. 23]. The load struck Anderson, and he sustained fatal injury, and died the same day [Tr. 8, 28].

Although the longshoremen occasionally loaded coal and other ship's stores [Tr. 8], the normal procedure was that the longshoremen had no connection with the loading of coal, except in an emergency, or when stores for several months' supply are being loaded [Tr. 29, 30, 31, 35, 36, 41]. It was physically impossible to load the coal safely

and properly with the No. 1 winch then in use, according to the longshoremen then actually operating the winch [Tr. 33, 35, 37]. Longshoremen's wages are an added expense to the employer, when they are directed to do work which the crew can normally perform [Tr. 31].

The employer did permit scrap lumber to be unloaded, where employees or their families so desired [Tr. 8, 25, 26, 27]. Otherwise the lumber would be discharged at sea [Tr. 26].

The widow of the employee filed a claim with the Deputy Commissioner, 13th Compensation District, Bureau of Employees Compensation, Federal Security Agency [Tr. 7]. After due hearing, the Commissioner found that "the act of bringing said coal on board was within the general scope of his duties in that it was part of his work to direct the winches in the loading and unloading of the ship, including occasional loading of ship's stores, and that his failure to comply with said *direction of the Mate* was an act of *minor disobedience* in the course of his work and not an act taking him outside the scope and course of his employment" [Tr. 8-9]. (Italics supplied.)

Award was made for the widow [Tr. 10]. The employer and its insurance carrier duly filed a complaint for injunction against enforcement of the award and for a decree that it was not in accordance with law [Tr. 2-6]. The widow answered, and both the plaintiffs and the defendant Pillsbury moved for summary judgment [Tr. 11, 12, 44, 45]. At the Court's request, all parties stipulated that the transcript of the testimony before Pillsbury could be deemed a part of the said motions [Tr. 46, 47]. Both sides filed points and authorities, which the Court considered. After a perfunctory hearing, the Court declin-

ing to hear argument, the plaintiffs' motion was denied and the defendant Pillsbury's was granted [Tr. 52-53]. Judgment was entered accordingly [Tr. 48]. The plaintiffs appealed [Tr. 50].

I.

This Court Has Power to Review the Question of Whether the Injury Sustained by Decedent John A. Anderson, Which Resulted in His Death, Arose "Out of and in the Course of Employment" Within the Meaning of 33 U. S. Code 902.

This appeal is based on the contention that the award [Tr. 10] is "not in accordance with law" (33 U. S. Code 921(b)).

It is contended that the award is not in accordance with law, in that the Federal law limits liability of an employer for death of an employee to a situation where the "death results from an injury occurring upon the navigable waters of the United States * * *" (33 U. S. Code 903).

The Act defines "injury" to mean "accidental injury or death arising out of and in the course of employment" (33 U. S. Code 902).

Legal Problem.

The question of whether an employee was in the course of employment at the time of the injury is a legal problem, when the facts relative to the employee's duties are undisputed. The determination by the Commissioner will be reviewed by the Courts.

Norton v. Warner Co. (1944), 321 U. S. 565, 88 L. Ed. 931, 64 S. Ct. 747;

Tucker v. Branham (C. C. A. 3rd, 1945), 151 F. 2d 96.

II.

The Violation of an Employer's Lawful Order, by an Employee, for His Own Benefit or That of a Stranger, Amounts to a Frolic and Detour, which Removes the Employee From the Course of Employment.

The evidence was uncontradicted that the employee here disobeyed a specific *direction* of the employer not to use the No. 1 winch to load the coal and not to load the coal at all but to leave that job for the crew.

The Commissioner attempted to create an exception to the recognized legal rules by holding "* * * that his failure to comply with said direction of the mate was an act of *minor disobedience* * * *" [Tr. 8, lines 28-29]. (Italics supplied.) There is no doubt that this so-called *minor disobedience* was serious and dangerous enough to become the proximate cause of the death of the man who committed it. To describe it as minor seems the acme of understatement, under the circumstances. Diligent search has failed to reveal any case law to support an exception that the Commissioner can keep the employee in the course of employment by describing the violation as *minor*.

Common Law.

The rule at common law, before the enactment of workmen's compensation legislation, prevented a servant from recovering from the master for damages sustained by injury proximately caused by the servant's violation of the master's order.

Schuh v. Herron (1917), 177 Cal. 13, 169 Pac. 682;

39 *Corpus Juris* 804, 806;

15 *A. L. R.* 1378.

The Workmen's Compensation Acts were not designed to change the common law rule in this regard.

Schuh v. Herron, supra (Calif. Employers' Liability Act).

So also, the Federal Employers' Liability Act did not abolish the rule that an employer is not liable for injury to an employee proximately caused by disobedience of an order which was not abrogated by non-enforcement.

Unadilla V. R. Co. v. Coldine (1928), 278 U. S. 139, 49 S. Ct. 91, 73 L. Ed. 224;

Yadkin R. Co. v. Sigman (1925), 267 U. S. 577, 45 S. Ct. 230, 69 L. Ed. 796;

McAllister v. Sunrock R. Co. (1945), 93 N. H. 400, 42 A. 2d 733;

Miller v. S. P. Co. (1933), 82 Utah 46, 21 P. 2d 856 (cert. den. 290 U. S. 697).

Restatement Rule.

The *Restatement of Agency* provides that:

"Except where a statute provides otherwise, a servant harmed by the concurrence of his own wilful and unjustified violation of orders and the negligence of the master has no cause of action against his master for such harm."

Restatement of Agency, Sec. 526.

State Cases.

The statutory phrase, "arising out of and in the course of employment," is the standard language of workmen's compensation legislation. Congress, in copying those words from the New York law, unfailingly indicated its intention to adopt a rule uniform with prevailing state

practice. State cases, especially those of New York, thus are established precedents.

Case v. Pillsbury (C. C. A. 9th, 1945), 145 F. 2d 392;

West Penn. Sand Co. v. Norton (C. C. A. 3rd, 1938), 95 F. 2d 498;

Empl. Liab. Assur. Corp. v. Monohan (C. C. A. 1st, 1937), 91 F. 2d 130;

Kobilkin v. Pillsbury (C. C. A. 9th, 1939), 103 F. 2d 667.

Under the New York rule the servant must be doing the work he was hired to perform.

DiSalvo v. Menihan Co. (1919), 225 N. Y. 123, 121 N. E. 766;

Glatzl v. Stumpp (1917), 220 N. Y. 71, 114 N. E. 1053;

Johnson v. Seeberg Mfg. Co. (1925), 211 App. Div. 241, 207 N. Y. Supp. 401 (unauthorized use of a saw by a varnish sprayer, held not in course of employment . . . even though no prohibitive order proved).

Aiding oneself or a fellow-servant is beyond the course of employment, even though the employer derives an incidental benefit.

Marks v. Grey (1928), 251 N. Y. 90, 167 N. E. 181;

Gisner v. Dulap (1920), 191 App. Div. 633, 181 N. Y. Supp. 789;

Lansing v. Hayes (1921), 188 N. Y. Supp. 329, 196 App. Div. 671 (affirmed 233 N. Y. 614, 135 N. E. 940).

The uniform and universal rule in the construction and application of the said standard phraseology ("arising out of and in the course of employment") negates liability where the injury would not have occurred *but for* the employee's deliberate and direct violation of orders of his master.

39 *Corpus Juris* 806;

20 *R. C. L.* 789, 790, 796, 797;

35 *Am. Jur.* 852, 853;

Metro. Sand Co. v. Lowe (D. C. N. Y., 1938), 22 Fed. Supp. 65;

Fazio v. Cardillo (App. D. C., 1940), 109 F. 2d 835 (horseplay);

Horsfall v. The Juna (Engl., 1913), W. C. & Ins. Rep. 183;

Yodakis v. Alex. Smith Co. (1921), 183 N. Y. Supp. 768, 193 App. Div. 150 (affirmed in 230 N. Y. 593, 130 N. E. 907).

The leading British case is *Herbert v. Fox* [1916] A. C. 405, 7 B. R. C. 142, Ann. Cas. 1916D 578 (which the Supreme Court has cited favorably in the case of *Cardillo v. Liberty Mutual Ins. Co.* (1947), 330 U. S. 469 at 479, 91 L. Ed. 1028, 67 S. Ct. 801). In the *Herbert* case it was held that a workman whose duty was to walk ahead of a moving car, as a lookout, is not in the course of employment, where he rides the car buffer, and thus proximately causes his own injury.

One of the leading and most frequently cited American precedents is *In re McNicol* (1913), 215 Mass. 497, 102 N. E. 697, L. R. A. 1916A 306, in which Chief Justice

Rugg traces the origin of the phrase "arising out of and in the course of employment" to the English statute, and states that the earlier British decisions "are entitled to weight."

See *Murphy v. Cooney* (1914), 2 I. R. 76, 48 Irish Law Times 13 (held, drunken mate not injured in course of employment, where master relieved him of duty and ordered him below, but he remained eight or ten minutes at head of ladder leading to deck and then apparently fell down the ladder. The award by the court below was reversed).

California cases recognizing the rule include the following:

Cor. Beach Co. v. Pillsbury (1916), 172 Cal. 682, 158 Pac. 212, L. R. A. 1916F 1164, 21 I. A. C. 384 (horseplay case, holding no liability because the risk must be one reasonably incident to the employment);

Ind. Indem. Exch. v. I. A. C. (June 15, 1948), 86 A. C. A. 226, 194 P. 2d 552 (where employee asked to use truck to get clothing to move from one job to another for same employer. On refusal, he took truck anyway and was killed in an accident. Held: not in course of employment);

Nat. Auto Ins. v. I. A. C. (1937), 8 Cal. 2d 715, 68 P. 2d 361 (held, a servant whose instructions were to report to work at 3 a. m. and wait at shop for the master, was not in the course of employment when he left the shop area to look for his master. He was beaten and robbed three blocks from the shop);

S. F. Ry. Co. v. I. A. C. (1927), 201 Cal. 597, 258 Pac. 86 (where a boat captain went onto the wharf to repair a jammed contact point, without taking the precaution of turning off the electric current. His orders were "to log the damage and immediately report it to the line repair staff for repair." As in the instant case, his action was a violation of the order, and the court held the consequent injury did not arise out of or in the course of employment);

Williamson v. I. A. C. (1918), 177 Cal. 715, 171 Pac. 797 (refusing to make an unwarranted construction of the law to cover the volunteer act of a chambermaid who good-naturedly tried to do the janitor's work, while the janitor was ill);

Lumberman's Mut. Co. v. I. A. C. (1933), 134 Cal. App. 131, 25 P. 2d 22 (*held* injury while loitering in street near work place, while awaiting arrival of packing boxes so he could start picking oranges, is not a normal employment risk and not compensable);

Jenks v. Carey (1933), 136 Cal. App. 80, 28 P. 2d 91 (upholding finding that employee voluntarily doing an act beyond his duties even for employer, is outside the course of employment);

N. W. Pac. R. R. Co. v. I. A. C. (1917), 174 Cal. 297, 163 Pac. 100, L. R. A. 1918A 286 (held, railroad clerk, on duty on train who alighted to see result of a train accident and was himself killed while trying to reboard the train, was not in the course of employment);

Pac. Coast Cas. Co. v. Pillsbury (1916), 31 Cal. App. 701, 162 Pac. 1040 (held injury while using elevator in violation of order, is not compensable, as not in course of employment).

U. S. Attorney's Argument Below.

In the District Court, the U. S. Attorney argued that certain cases tended to support his view that the Award should be ruled legal. In anticipation that he still relies on the cases he cited below, we present the following analysis of his cases:

1st. Capital Transit Co. v. Hoage (App. D. C., 1936), 84 F. 2d 235, a case in which one Parrott, an employee, had been ordered not to work on any electrical equipment carrying live electricity, because of the employee's bad accident record. The employee worked on repair of cylinders, and the testing of such cylinders with high voltage current was a necessary part of the process, and would have had to be done by some fellow-employee. The employee, however, in violation of orders, made the test himself, without using any of the standard precautions such as insulated gloves, which were available. The only other fellow-employee available at the time of the test told the employee Parrott to "put 1500 on it." The Commissioner found as a fact that in making the test, Parrott did not deviate "from his duties." The appellate court held that even though he disobeyed his instructions, he was still doing a necessary part of the job on which he was working.

In the instant case, the loading of the coal with the wrong equipment at the wrong time by persons who were paid at an hourly rate for other work was totally unnecessary, as far as the employer was concerned, and merely increased the expenses of the employer by making it necessary to have the coal reloaded and moved with other equipment at later time. If the employee had obeyed orders, the additional time of reloading the coal on other

equipment would have been saved. Moreover, in the instant case, the instruction was clear and unequivocal, whereas in the *Capital Transit* case, a fellow employee had actually instructed Parrott to perform the test and Parrott was thus directly aiding an employee who was authorized (and not forbidden) to make the dangerous electrical test.

2nd. The case of *Md. Cas. Co. v. Cardillo* (App. D. C., 1939), 107 F. 2d 959, involved the murder of an insurance agent, by strangers who had apparently picked him up while he was drunk for the purpose of robbery, because they saw he was carrying an insurance book and thought he might have made sizeable collections. The deputy commissioner found "that the criminal risk or hazard * * * was peculiar to, and increased by, his employment as an insurance collector." Surely, the Government does not seriously contend that such a case is in point! Can it be said that the risk of death from violation of orders was increased by the "tempting" nature of Anderson's employment in charge of machinery which is dangerous when not used properly? Such a holding would stretch beyond the breaking point the legal test—"arising out of and in the course of employment."

3rd. The case of *Bull Insular Line v. Schwartz* (D. C. N. Y., 1938), 23 Fed. Supp. 359, involved a situation where a longshoreman was killed when he went aboard ship to obtain a dunnage board to stand on while he worked on the dock during the rain. There was evidence that it was customary for longshoremen to go aboard the ship for such purpose and also in order to smoke. *The Deputy Commissioner failed to make any finding regarding the employer's alleged rule forbidding longshoremen*

to board shlp, and the court found only unsubstantial evidence thereof in the record. The case is supported on the rule that a scintilla of evidence is not enough, or on the rule that a conflict in the evidence had been resolved by the Commissioner, or on the rule that violation of a standing order which is never enforced does not take the servant beyond the course of his employment (*Cf. Tullis v. Lake Erie Ry.* (C. C. A. 7th, 1901), 105 Fed. 554, for the same rule under common law).

4th. The case of *Penn. Stevedoring Corp. v. Cardillo* (D. C. N. Y., 1947), 72 Fed. Supp. 991, also involved alleged violation by the employee of a standing order regarding not leaving the barge on which he worked, during the ten minute rest period between trips. The Court said:

> "There was ample evidence from which he (the deputy commissioner) could infer that if there were a company rule limiting the scope of Best's wanderings, it was not strictly enforced. * * * Violation by the employee of an unenforced rule cannot defeat an otherwise well founded claim to compensation." (at p. 993.)

It is respectfully submitted that this case is not in point inasmuch as the instant case concerns a direct, specific order given immediately before the accident, *and does not involve any evidence of any standing order which was customarily disregarded and left unenforced.*

It is further submitted that an employer must be allowed to control his employees, especially by specific directives; and employees who deliberately and immediately violate said orders must necessarily be regarded in a realistic way, that is, as having departed from the course of

their employment and having entered into a frolic and detour of their own.

The Government further raised the "calamity howl" that a holding in plaintiffs' favor "would permit an employer by means of a comprehensive set of rules, to render the statute practically nugatory," quoting *Nachechko v. Bowen Mfg. Co.* (N. Y. 1917), 179 App. Div. 573. It will be time enough to cite that reasoning when a case arises where the employer has tried to negate his statutory liability in that manner by a comprehensive set of rules. *This case is certainly not an apt one for its citation.* Here the employer merely asked the employee to do the work he was hired to do and ordered him not to enter into a frolic and detour of his own for the purely private purpose of helping a friend to obtain some waste and scrap wood on the deck. The Commissioner surmised that the employee was going to use the sling in which the coal was loaded for moving the lumber. The Commissioner jumped from the fact that if the sling had been free, the employer would have customarily permitted its use for discharging the lumber, to the conclusion that it was therefore *within the course of employment for an employee to violate a specific instruction, just given and fresh in his mind, not to pick up and unload the sling which carried the coal.* There was no evidence of a custom of loading coal to free a sling to unload lumber.

It is submitted that that kind of "logic" would make the employer the insurer of the safety of an employee

who, in deliberate violation of a specific order, uses a dangerous instrument for his own private purpose and in doing so accidentally kills himself! *Is that the purpose of the law? Should it be liberally construed to effect that result?*

Wilful Misconduct.

The Government argued that the rule-violation must amount to wilful misconduct to constitute a bar. No Federal cases were cited by the Government on this point. But, can anyone doubt that the employee here *wilfully* disobeyed the specific order? And, can anyone doubt that it is *misconduct* for an employee to disobey such an order?

The "second rule" cited by the Government which they say plaintiffs and appellants have not complied with, is that an employee who is *doing his job* is within the course of employment even if he violates orders as to how to do it. It is submitted that the argument begs the question, which is

> Can an employee be held to be doing his job and acting within the course of his employment when he deliberately violates an order not to pick up a load of coal with the employer's machinery, by picking up that load, as a result of which it swings against him and kills him, when his purpose in picking it up was a private detour of his own, to obtain a sling to discharge scrap lumber for a friend?

The problem cannot be solved by begging the question. It calls for an exercise of judicial discretion in the appli-

cation of the Federal statute and the determination of whether Congress intended to cover the type of activity here involved when it enacted as the legal test the traditional phrase in compensation laws, "arising out of and in the course of employment."

It is respectfully submitted that had Congress intended to broaden the usual test of liability, it would have used different and more inclusive language which had not already been judicially construed more narrowly.

The Voehl Case.

The case of *Voehl v. Indem. Ins. Co.* (1933), 288 U. S. 162, 77 L. Ed. 676, was cited by the Government as "in direct support of the present award." The case arose under the District of Columbia Law, where an employee was driving to work on Sunday and where his pay was computed from the time he left home. The employer's defense was that on the occasion in question, the injured employee had a private purpose, *i. e.,* to obtain ashes for personal use. The evidence indicated a mixture of private purpose and also of cleaning up trash as a part of his regular job. *The injury did not occur while the employee was engaged in an exclusively private venture in violation of recently given specific orders of the employer.*

How such a case is "in direct support of the present award" is not explained in the Government's Points and Authorities!

The Government relied heavily on the case of *Cardillo v. Liberty Mut. Ins. Co.* (1947), 330 U. S. 469, 67

S. Ct. 801, 91 L. Ed. 1028. That case involved the familiar rule that an employee is not covered by workmen's compensation while en route to work, and the standard exception to that rule, providing coverage where the hazards of the route to the place of work "may fairly be regarded as the hazards of the service." The employee worked for a District of Columbia corporation, under a collective bargaining agreement which required the employer to pay transportation for all work assigned to the employee outside the District. He was assigned to the Quantico Marine Base and traveled there with fellow employees, under a car-pool arrangement. The accident occurred while the employee was en route. The Supreme Court reversed a Circuit Court decree against the Commissioner's finding of "course of employment," upon the ground that the finding was supported by substantial evidence. *The rule of the case was certainly not intended by the Court to solve all future problems.* The Court said:

> "No exact formula can be laid down which will automatically solve every case."

Mr. Justice Murphy decided the case by judicial examination of the record:

> "Turning to the factual support for the Deputy Commissioner's inference that Ticer's injury arose out of and in the course of employment, we find ample sustaining evidence." (330 U. S. at 483, 91 L. Ed. 1039.)

III.

Is an Act Permitted by the Employer Therefore Within the Course of Employment?

It will be noted that the Commissioner's report says that the purpose of Anderson, according to surmise (or conjecture?) was to obtain the sling to use it "to discharge some waste and scrap wood on the deck to the dock, *an act permitted by the employer.*" [Tr. p. 8, lines 19 to 24.]

Of course, conjecture and surmises are not substantial evidence of the kind required to support a finding.

New Am. Ins. Co. v. Hoage (1939), 46 F. 2d 837;

Eldridge v. Endicott (1920), 228 N. Y. 21, 126 N. E. 254;

Note, 20 A. L. R. 1.

But where, to begin with, is there any authority that the employer's tolerance or permission is sufficient to make the servant's action a part of the course of employment?

Under the New York rule, prevailing when Congress copied the New York statute, the servant's permitted use of the master's facilities for a private purpose, even as a part of the compensation, did not make the "work" thus done a part of the course of employment.

Daly v. Bates (1918), 224 N. Y. 126, 120 N. E. 118.

On the contrary, the action here was for the personal convenience of the servant or his friends. It was worse than useless, as far as the employer was concerned, to load coal with the wrong winch, in the wrong place, at superadded expense!

Moreover, there was not a scintilla of evidence that the employer ever permitted coal to be loaded by longshoremen to free a sling for use in discharging scrap lumber for private use.

The *Agency Restatement*, at page 511, contains the following apt comment:

> "If, however, such acts are for the personal convenience of the employees and are merely permitted by the master in order to make the employment more desirable, the acts are not within the scope of employment. As in other situations, the fact that the acts are done upon the master's premises or with his instrumentalities is important but not conclusive."

It seems clear, therefore, that the Commissioner's finding that the practice of discharging scrap lumber was *permitted* by the employer—although true in itself—is insufficient to warrant a conclusion that this employee was in the course of employment or that the injury arose out of the employment.

It was undisputed that the injury arose out of the employee's attempt to load coal in violation of a direct order, and that such loading would free the sling.

If the employee had loaded the coal safely, freed the sling, and has started to unload the lumber—then perhaps it could be rationally argued that he was doing a *permitted* action—in spite of the earlier orders. But surely there is no ground in the record to support a conclusion that he was *permitted* to disobey the chief mate's order not to load the coal!

The Act is entitled to liberal construction *to accomplish its purpose,* but it should not be misconstrued to make

employers insure employees against injury arising from violation of orders for private, non-business purposes. The increased insurance premium for such risks is not a proper item of business and industrial expense.

Cf. Contractors v. Pillsbury (C. C. A. 9th, 1945), 150 F. 2d 310.

Conclusion.

It is therefore submitted that the District Court erred in giving summary judgment for defendants, and that the judgment should be reversed with instructions to give judgment for plaintiffs as prayed, on the ground that the Commissioner's award was not in accordance with law.

Respectfully submitted,

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